

STATE OF MICHIGAN
COURT OF APPEALS

GREG FAUCHER,

Plaintiff-Appellee,

v

DARREN WEHNER,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 274922

St. Clair Circuit Court

LC No. 05-002694-NO

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his motion for summary disposition in this premises liability case. Regardless of whether plaintiff was an invitee or licensee, because the risk of slipping and falling off the paper-covered pitched roof was open and obvious, and the condition was not so dangerous as to render the danger unreasonable despite plaintiff's actual knowledge of the hazard, the trial court erred when it denied defendant's motion for summary disposition, and we reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that plaintiff was not on his premises for a commercial purpose, and thus not entitled to invitee status. In addition, defendant asserts that as a licensee, plaintiff was owed a duty to be warned of hidden dangers, but not to be warned of open and obvious dangers. Defendant also contends that the conditions on the roof at the time of the accident were open and obvious; therefore, defendant owed plaintiff no duty. We review a decision on a motion for summary disposition de novo. *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). "When reviewing a motion for summary disposition based on MCR 2.116(C)(10), [this Court's] task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). We must "consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id.*, quoting *Radtke v Everett*, 442 Mich 368, 374; 501 NW 2d 155 (1993).

For premises liability purposes, a visitor is either a trespasser, a licensee, or an invitee, and the duty owed by the premises owner depends on the visitor's status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d (2000). "An invitee is one who enters the land of another for a commercial purpose on an invitation that carries with it an implication

that reasonable care has been used to prepare the premises and to make them safe.” *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). Plaintiff was not entitled to invitee status because he was not on defendant's premises for a commercial purpose. The reason for defendant's invitation to plaintiff was to secure a *volunteer* to help with his roof work. The fact that plaintiff volunteered and relieved defendant of the necessity to pay for that service did not negate the noncommercial purpose of the invitation; thus, the relationship lacked the pecuniary quid pro quo required by *Stitt, supra*, for finding invitee status. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 63; 680 NW2d 50 (2004).

We conclude that plaintiff was a licensee at the time of the accident. “A ‘licensee’ is a person who is privileged to enter the land of another by virtue of the possessor's consent.” *Stitt, supra* at 596. A landowner owes a licensee a duty to warn of any hidden dangers of which the owner knows or has reason to know, if the licensee does not know or have reason to know of the dangers. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. *Id.* “[A] possessor of land has no obligation to take any steps to safeguard licensees against dangers that are open and obvious.” *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). A danger is open and obvious if “‘an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.’” *Joyce, supra* at 238, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A roof clearly presents an open and obvious danger. *See, e.g., Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Plaintiff testified that he knew he needed to be careful on the roof because of the danger of falling to the ground.

Plaintiff claims that the tarpaper being installed on the roof was itself the dangerous condition, and that that condition was hidden. He testified that he did not know that tarpaper could be dangerous to stand on, and that he was not given any indication that the tarpaper could tear while he was standing on it with both feet. However, plaintiff's testimony is not dispositive. “Because the [open and obvious] test is objective, this Court ‘looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.’” *Joyce, supra* at 238-239, quoting *Hughes, supra* at 11. A reasonable person in plaintiff's position would have foreseen the danger presented by standing on thin strips of slippery, felt paper nailed down to an open, unguarded pitched-rooftop. Contrary to plaintiff's contention, the dangers presented by the tarpaper and the roof were not hidden.

The special aspects exception, which imposes liability for open and obvious conditions that are unreasonably dangerous or effectively unavoidable, is not applicable to persons with licensee status.¹ Plaintiff's licensee status renders unnecessary any analysis of whether the

¹ See *Pippin, supra* at 143, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (stating that “[only] where there is a duty to a visitor to make a condition safe [i.e., the duty to an invitee], potential liability will remain for harm from conditions that are still unreasonably dangerous, despite their open and obvious nature.”).

condition on the roof was unreasonably dangerous. Accordingly, defendant did not have a duty to warn plaintiff, a licensee, of the open and obvious danger posed by the roof or by the tarpaper being affixed to the roof.

Even if we were to conclude that plaintiff was an invitee at the time of the accident, and therefore apply a special aspects analysis to the conditions present when plaintiff fell, it is readily apparent that an ordinary rooftop, and thin strips of tarpaper nailed thereto, do not constitute effectively unavoidable or unreasonably dangerous conditions. The record shows that plaintiff could have chosen to stand on portions of the roof that were not tarpapered, and that he knew of the risk of falling off a slanted roof. Defendant was entitled to summary disposition.

Reversed.

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio

/s/ Deborah A. Servitto